RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
JUL 5 1995
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

NO.: 94-1691

-against-

CLIVE SPENCER,

Respondent.

MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

PLEASE TAKE NOTICE, that upon the annexed Affidavit of **CLIVE SPENCER**, the undersigned will move this Court located at 1 First Street, N.E., Washington, D.C. on a date to be determined by the Court for an Order Granting:

I. RESPONDENT'S MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

And for such other and further relief that this Court deems just and proper.

DATED: Brooklyn, New York
July 5, 1995

Jay H Ch

Yours, etc.,

JAY H. SCHWITZMAN
Attorney for the Respondent
26 Court Street, 1406
Brooklyn, New York 11242
(718)797-1000

TO: CHARLES J. HYNES
DISTRICT ATTORNEY, KINGS COUNTY
Municipal Building
Brooklyn, New York 11201

9 pp

SUPREME COURT OF THE UNITED STATES

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NO.: 94-1691

-against-

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS -)

I, CLIVE SPENCER, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: See response to Petition for Writ.

I further swear the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Answer: No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None.

I understanding that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

CLIVE SPENCER

SUBSCRIBED AND SWORN TO before me this 6th day of July 1995.

JAY H. SCHWITZMAN
Notary Public, State of New York
No. 4-4902932
Qualified in Kings County
Commission Expires July 27, 1995

Jay H Schwitzman
NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

RECEIVED
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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF NEW YORK,

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-against-

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NO.: 94-1691

RESPONSE TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the police stop of an automobile to question the driver concerning the whereabouts of another individual is an unreasonable search and seizure.

REASONS WHY THIS COURT SHOULD DENY THE WRIT

This Court should deny the Writ because there were no exigent circumstances to warrant the police intrusion in this case and this Court should not allow the stopping of automobiles as an investigative technique.

The New York State Court of Appeals held in **People v. Clive Spencer** (84 NY2d 749), that the stop of a moving

vehicle to request information from the driver was an unreasonable search and seizure. The Court's analysis of the law and the facts of this case was correct in that they considered, the police were investigating past criminal activity rather than ongoing criminal activity; the police stopped an individual that was not suspected of criminal activity; there were no exigent factors that required this kind of police action; there existed other less intrusive options for the police to accomplish their objective; the police considered the Respondent a possible source of information. In addition the Court stated that the police action was unreasonable due to the unchecked discretion vested in the police officer.

Contrary to Petitioner's assertions, the Spencer Court clearly stated "we need not and do not hold today that police officers may never stop a vehicle in order to request information of its occupants. We merely hold that the specific objective facts of **this case** did not justify defendant's seizure." Id. at 760. The Court correctly applied the law to the facts of this case and concluded the stop of defendant's vehicle was unreasonable.

In addressing the lack of investigative technique and the failure to exhaust investigative technique the Court stated:

"... under the circumstances of this case, there was not genuine need for so immediate and intrusive an action as pulling over defendant's freely moving vehicle." Id. at 759.

Clearly, the Court closely examined the facts of this case and concluded the police action of stopping defendant's vehicle after a four to five minute canvass is not proper especially when you consider that this was the only technique employed. The police should have waited until the Respondent stopped his car at a traffic light. Once Respondent stopped his car the police could have approached Respondent and this encounter would have been treated as a pedestrian encounter.

In examining this case the police investigation was minimal and the police did not express any urgency to apprehend when the victim reported the crime forty-three hours earlier. The police did not act. The police told the victim to call when she sees her assailant. A boyfriend-girlfriend relationship existed between the victim and assailant and no effort was made to learn of his whereabouts when the crime was reported. Furthermore, there was no indication that the assailant was armed when the police were canvassing.

Petitioner attempts to have this Court give to police the unbridled power to stop automobiles as an investigative technique. This approach will extend the right to inquire to motorists.

Moreover, Petitioner's argument would allow suspects in cars to be stopped only when there is reasonable suspicion of criminal activity but law abiding citizens could be stopped if they **might** have information to a past crime.

Petitioner erroneously states that the information sought was vital and that the police was searching for an armed violent felony suspect. There is no evidence in the record that Respondent knew where the suspect was only that he might know. Furthermore, there is no evidence in the record that the suspect was armed when the police were looking for him. Exigent circumstances allows the police to stop an automobile. The instant case lacks exigent circumstances.

The proper police procedure in this case was to acknowledge that the stop of Respondent's vehicle was unconstitutional and to consider alternative techniques to accomplish their objective. Waiting for Respondent to stop his car at a traffic light or at a parking spot is one way the police could have accompolished their goal without infringing on an individuals constitutional rights. Waiting for Respondent to stop his car is not unreasonable when you consider that the police waited forty-three hours to look for the suspect.

CONCLUSION

The Court should deny Petitioner's application for a Writ of Certiorari because the Court properly applied the Law to the facts of the instant case.

Repectfully submitted;

JAY H. SCHWITZMAN
Attorney for Respondent
26 Court Street, Suite: 1406
Brooklyn, New York 11242
(718)797-1000

DATED: Brooklyn, New York
July 5, 1995

TO: CHARLES J. HYNES
DISTRICT ATTORNEY, KINGS COUNTY
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